Supreme Court, U.S.
FILED
MAY 29 1991
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In the

Supreme Court of the United States

October Term, 1990

No. 90-1663

WILLIAM R. SACHS,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to
The New York Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

On July 19, 1987, petitioner William Sachs was convicted in the Supreme Court, New York County (Andrias, J.), after a jury trial, of Bribe Receiving in the Third Degree (Penal Law §200.10) and was sentenced to a prison term of six months

and a two thousand dollar fine. Petitioner has completed that sentence.

By an order dated June 5, 1990, the Appellate Division, First Department, of the New York State Supreme Court unanimously affirmed the judgment against petitioner, without opinion. 162 A.D.2d 125. By an order dated June 28, 1990, the New York Court of Appeals denied petitioner's request for leave to appeal the decision of the Appellate Division. __ N.Y.2d __.

While his appeal was pending before the Appellate Division, petitioner made a collateral attack on his conviction before the trial court, seeking to vacate the judgment pursuant to Section 440.10 of the New York Criminal Procedural Law. By an order dated May 2, 1990, Justice Andrias denied petitioner's motion. On July 19, 1990, the Appellate Division denied petitioner leave to appeal that order. By order dated February 1, 1991, the Court of Appeals dismissed petitioner's

application for permission to appeal to that Court. Petitioner now seeks a writ of certiorari to review the order of the Court of Appeals.*

STATEMENT OF THE CASE

On February 16, 1987, petitioner, a plans examiner for the New York City Buildings Department, met undercover Detective Robert Lamarata for lunch at a Manhattan restaurant. The detective was posing as a building contractor in need of petitioner's help to get a permit to renovate a restaurant. During that lunch, in which the conversation was taped, petitioner accepted $1000 of a promised $5000 from the detective. In

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*By his petition, petitioner purports to seek review of the Court of Appeal's dismissal of his application for leave to appeal. However, that Court lacked jurisdiction to hear that appeal. New York Criminal Procedure Law §450.90. Since petitioner does not challenge that jurisdictional ruling, but rather challenges the actions of the trial court, it will be assumed that he is seeking a writ of certiorari to the New York State Supreme Court.

return, petitioner guaranteed that he would either approve Lamarata's permit application himself or would use his influence to ensure that it was approved by the examiner to whom it was assigned. The two then parted company.

The detective met with petitioner again two days later and arrested him. At that time, petitioner still carried in his trouser pocket $900 of the $1000 that the detective had given him at the lunch.

On May 22, 1987, a New York County Grand Jury charged petitioner with Bribe Receiving in the Third Degree. Ind. No. 4807/87. On May 5, 1988, petitioner proceeded to trial before the Honorable Richard T. Andrias and a jury and, on May 9th, the jury found petitioner guilty of the charge submitted to it. On July 19, 1988, petitioner was sentenced to a prison term of six months and a two thousand dollar fine.

By an order dated June 5, 1990, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment against petitioner, without opinion. 162 A.D.2d 125. By an order dated June 28, 1990, the New York Court of Appeals denied petitioner's request for leave to appeal that order. ___ N.Y.2d ___.

Petitioner also sought collateral review of his conviction, moving to vacate the judgment of conviction pursuant to New York Criminal Procedural Law §440.10. In that pro se motion, petitioner claimed that prosecution witnesses had made false statements of material facts; that the trial judge "conferred improperly" with the prosecutor and a witness, erred in engaging in an off-the record sidebar, and improperly "rehearsed" the testimony of a prosecution witness by asking him to clarify a statement he had made; that his attorney failed to object to the witnesses's falsehoods and did not present testimony and evidence that petitioner

wanted presented; and that a portion of the tape introduced into evidence had been tampered with. Justice Andrias denied petitioner's claims, finding them "total fabrication and fantasy." On July 19, 1990, the Appellate Division denied petitioner leave to appeal that order. By an order dated February 1, 1991, the Court of Appeals dismissed petitioner's application to appeal to that Court on the ground that the order was not appealable under the New York Criminal Procedure Law.

In his petition to this Court, petitioner's sole claim is that he was denied his constitutional rights when Justice Andrias, rather than another judge, decided his motion which included charges of judicial misconduct.

ARGUMENT

NO GROUNDS EXIST WHICH WOULD WARRANT GRANTING THE PETITION.

Petitioner contends that his due process rights were violated when Justice Andrias decided his motion to vacate his conviction. According to petitioner, Justice Andrias should not have decided that motion because it included claims of judicial misconduct on the part of Justice Andrias. Petitioner's claim does not warrant review by this Court.

Preliminarily, in accordance with Rule 10 of this Court's rules, a petition for a writ of certiorari will be granted "only when there are special and important reasons therefor." Sup. Ct. R. 10. Here, petitioner has not demonstrated any such "special and important reasons." Rather, the law governing petitioner's claim is well-settled, and, indeed, in this case that well-settled law plainly was correctly applied to this case.

First, while petitioner claims that Justice Andrias should have recused himself and not decided his motion to vacate the judgment, he never asked the judge to do so. Thus, he is asking this Court to find that his constitutional rights were violated when the trial judge did no more than he was asked to do -- decide the motion presented to him by petitioner.

Moreover, had petitioner sought recusal, it would have been a proper exercise of the court's discretion and would not have infringed upon petitioner's constitutional rights had Justice Andrias refused to recuse himself. Indeed, it only in the "most extreme" case where disqualification is constitutionally required on the basis of allegations of bias or prejudice on the part of a judge. Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 820 (1986).

In Aetna Life Insurance Co., supra, the plaintiff alleged bad faith refusal by an

insurance company to pay a claim. The defendant insurance company sought recusal of a judge on the appellate panel hearing the case, on the ground that the judge had filed a similar suit against another insurance company and because he had, in a deposition, expressed hostility toward insurance company practices. This Court rejected the defendant's claim that the judge's stated hostility toward insurance companies constitutionally mandated his disqualification from the case, noting that such allegations of hostility on the part of the judge "fell way below" the constitutional level which would require disqualification. Aetna Life Insurance Co. v. Lavoie, id. at 821. However, the decision against the insurance company in which the judge had taken part "had the clear and immediate effect of enhancing both the legal status and the settlement value" of his pending civil suit, and, for that reason, his failure to recuse himself

denied defendant due process. Aetna Life Insurance Co. v. Lavoie, id at 824. In making this distinction, this Court contrasted cases involving "mere allegations" of bias with cases in which the judge has a "direct, personal, substantial, pecuniary interest" in the outcome of the case he is asked to adjudicate. Only in those extreme cases, the Court held, does due process require that the judge recuse himself from hearing the case.

Thus, in Tumey v. Ohio, 273 U.S. 510 (1927), the Court held unconstitutional a State system where the mayor, who served as a justice of the peace, received as his only source of payment for his judicial services fines imposed after convictions. Such a system, the Court concluded, denied the accused due process of law because the judge had a direct, personal, substantial, pecuniary interest in convicting defendants. The Court noted that that financial interest gave the

judge the "possible temptation...to forget the burden of proof required to convict the defendant" or "might lead him not to hold the balance nice, clear and true between the State and the accused" Tumey v. Ohio, id. at 532.

Here, due process did not require the judge to recuse himself because he had absolutely no "direct, personal, substantial, pecuniary interest" in the outcome of defendant's motion to vacate the judgment. Certainly, the mere fact that petitioner alleged judicial misconduct in his motion did not mean that the judge had some "interest" in the outcome of the motion which might require recusal, especially when all his claims were so clearly frivolous.

Indeed, even a quick review of that motion makes clear that petitioner's claims did not demonstrate any misconduct on the part of the trial judge, but were based upon petitioner's apparent ignorance of how a trial is conducted.

For example, petitioner attached some sinister meaning to the trial judge's questioning of witnesses and his conducting off-the-record sidebars, but those are common and appropriate occurrences at a trial. To require the judge to recuse himself based upon such meritless allegations would be absurd. Such recusal would simply require some other judge to spend the time to review the trial transcript before the frivolous contentions could be laid to rest.

Notably, the cases petitioner cites, which he suggests indicate a "conflict" in the courts about when it is appropriate for a judge to recuse himself, all stand simply for the well-settled proposition that a judge should recuse himself from adjudicating a proceeding when he will be called as a witness. See e.g., United States v. Hughes, 325 F.2d 789 (2d Cir.), cert. den., 377 U.S. 907 (1964); United States v. Valentino, 283 F.2d 634 (2d Cir.); United States v. Halley, 240

F.2d 418 (2d Cir.); cert. den., 353 U.S. 967 (1957). Here, petitioner's conclusory allegations did not require a hearing, much less one in which the judge would be called as a witness. Even his claims that did not involve the judge's conduct essentially involved his disagreement with the prosecution witnesses' testimony about the events leading up to his arrest; his bald allegation that these witnesses had thus committed perjury was supported by no evidence, but merely revealed the unremarkable fact that petitioner chose to construct the events leading to his arrest in a light favorable to himself. And, as noted, his allegations against the judge were so patently baseless on their face that no hearing was required to resolve them.

In short, Justice Andrias had no "direct, personal, substantial pecuniary interest" in the outcome of petitioner's motion and thus there was no constitutional bar to his deciding the motion.

Further, since Justice Andrias was in the best position to rule on the validity of petitioner's claims and was not required to serve as a witness at a hearing in connection with them, there was no reason for him to recuse himself, particularly when petitioner never requested that he do so. Petitioner has failed to present any "special and important reasons" which would warrant granting a writ of certiorari.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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May 1991